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Supreme Court, U.S.
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98 700 OCT 26 1998

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No. _____

In The

Supreme Court of the United States

October Term, 1998

GRAND RIVER DAM AUTHORITY and RONALD COKER, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority,

Petitioners,

v.

JACK DALRYMPLE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

(1) Whether an order denying a party an immunity defense is unreviewable if it is contained in a remand order; and

(2) Whether a court may make a substantive ruling on immunity and shield such ruling from review by placing it in a remand order?

LIST OF PARTIES

The Petitioners are Grand River Dam Authority and Ronald Coker in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority.

The respondents are: Jack Dalrymple; Rosemary Dalrymple; David A. Adams; R.D. "Buddy" Adams; Kenneth Bales; Patricia Bales; Gerald L. Baser; Bettie L. Baser; Larry J. Becker; Robert K. Berry; Susan M. Berry; Mark E. Blankenship; Board of Commissioners of Ottawa County, Oklahoma; Charles Bowling; Kathy Bowling; Calvin Brady; Chet Brewington and Susan Brewington, d/b/a Thunderbird Motel; Edna Offutt Bryant; George Campbell; Carol Sue Campbell; Kenneth Cass; Maxine Cass; Marvin Champlin; Joyce Champlin; Don Childers; Dee Childers; City of Miami, Oklahoma, a Municipal Corporation; H. Dale Conard; Sherry Davis; Chester Desilva; Debbie Desilva; E.G. Ventures, Inc.; Maxine Ferguson; Earl B. Ferris; Kenneth Ferris; Diann Ferris; Howard W. Hoover; Stephen L. Hunter; Debbie L. Hunter; Smithy Jameson; K.C. Jeffries; Gary B.Jenkins; Betty A. Jenkins; Steve Kresyman, d/b/a/ Miami Car Wash; Roy K. Lacen; Ida M. Lacen; Jeffrey Lavine; Johnia Lavine; Bruce Lawrence; Regina Lawrence; Faye Lester; Vera Dowty Lowery; Tim Lucas; Rhonda Lucas; Chris Mabury; Debra Mabury; Nadine Macy; Justin Mahurin; Becky Mahurin; Louis E. Mathia, d/b/a Riverside Auto Salvage; Jeffry McCool and Carolyn McCool, d/b/a Vettes and Vans; E.W. McRae; Miami Animal Hospital, Inc.; Miami Tire Service, Inc.; Miami Tribe of Oklahoma; Mid-America Land, Grain

LIST OF PARTIES – Continued

& Cattle Company; Leo J. Mills; Virginia D. Mills; Jimmie Mooneyham; Alan E. Newkirk; Mary Niffen; Tammy Niffen; Robert E. Patterson; David D. Payne; Robert Pewitt; Ann Pewitt; Tim Potter, d/b/a Potter Landscaping & Nursery; James Redden; Cathy Redden; Wayne E. Roberts; Claude Rogers; Joseph A. Rosin; Rosin Heritage, Inc.; Paula S. Rutledge; Nick A. Shade; Marian Shipman; Gary Roy Shoultz, d/b/a Gary's Barbecue and Deli; Robert L. Silversmith; Ruth Silversmith; Bess M. Stephens; Edison B. Stepp; Patricia Stevens; Randy Stoner; George S. Stunkard, d/b/a Blaster's Arcade; Glen Summers; Dean Trone; Teresa Trone; Bert Vanatta; C.H. Vanatta; Donald Vaughn; Loretta J. Vaughn; Emma Vaughn; Everett R. Wagoner; Madeleine Wagoner; Joseph Walden; Harold Watson; Bill E. Way; Shelby Way; Maynard Weathers; Joann Weathers; Lahoma Webb; Michael Webb; Ruth Webb; Wayne L. Webb; Nancy C. Webb; R. Neil Wells; James L. Wetzel; Harmon Wiley; Anna Lee Wiley; John D. Wilhoit, Jr.; Rose M. Wilhoit; David Wilkinson; James Worley; Cheryl Worley.

United States of America ex rel. Federal Energy Regulatory Commission, and United States Army Corps of Engineers.

In addition to the parties listed in the caption, Knotts Motor, Inc. and JoAnn Long sought to intervene in the action. Their motion to intervene was denied after the case was remanded to state court. The proposed intervenors did not file a brief in the Tenth Circuit.

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REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion of the Court of Appeals is reported at *Dalrymple v. GRDA*, 145 F.3d 1180 (10th Cir. 1998) and is reproduced in the appendix at page 1. The reported opinion of the district court is *Dalrymple v. GRDA*, 932 F.Supp. 1311 (N.D. Okla. 1996), and is also included in the appendix. In addition, the unreported opinions of the district court are reproduced in the appendix at pp. A-25-A-44.

STATEMENT OF BASIS OF JURISDICTION

On May 28, 1998, the United States Court of Appeals for the Tenth Circuit entered its order dismissing Grand River Dam Authority's appeal from an order denying immunity. A timely filed petition for rehearing was denied on July 28, 1998, and this petition was filed within 90 days of the order denying rehearing.

Review is sought under 28 U.S.C. § 1254(1), pursuant to Supreme Court Rule 10(a) and 10(c). The trial court's jurisdiction was premised upon 28 U.S.C. §§ 1331, 1442(a)(1), 1446(a)(1), and 1441(b). Jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291, and the collateral order doctrine found in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Appeal was from an order which rendered a substantive decision on the merits, determining GRDA had not alleged a colorable claim of immunity, as well as a final order of dismissal.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions are set forth in the appendix at pages 47-54. The citations are as follows: U.S. CONST. Art.VI cl.2; 16 U.S.C. § 811; 28 U.S.C. § 1442; 28 U.S.C. § 1446; 28 U.S.C. § 1447; 33 U.S.C. § 702c.

STATEMENT OF THE CASE

Three lawsuits were filed in state court in Ottawa County, Oklahoma, by landowners who claimed damages and sought relief in inverse condemnation from the Grand River Dam Authority, (GRDA) a public not-for-profit agency operating the Pensacola Dam and Grand Lake in Northeastern Oklahoma. Grand Lake is part of the Neosho River, a tributary of the Arkansas and Mississippi Rivers, and its operation directly affects at least four states. Plaintiffs (a) sued for flood damages that occurred when the Secretary of the Army, ex rel. United States Army Corps of Engineers (Corps) was operating the dam (through GRDA), (b) sought to enjoin the continued operation of the dam for flood control purposes, and (c) requested alteration of the water levels in Grand Lake, as maintained by GRDA under direct FERC orders as part of its license.

The acts complained of, and sought to be enjoined, were accomplished by GRDA as agent and contractor of the federal government. Invoking the doctrine of shared

immunity,[1] GRDA removed the cases to federal court and asserted third-party claims for indemnity against the United States. GRDA alleged the United States was at least a necessary party because of the request for injunctive relief against operation of the dam. GRDA invoked the federal officer removal statute, presenting undisputed evidence in its removal notice that it acted as agent for the United States with respect to the opening and closing of the gates at the dam on the date of the floods at issue. GRDA offered evidence that control of the dam was ceded to the United States during times of actual and threatened flooding because the dam, situated on a navigable river, is an integral cog in a multi-state flood *system* operated by the United States Army Corps of Engineers for the benefit of the citizens of Missouri, Kansas, Arkansas and Oklahoma.

Because of this extensive federal control, GRDA contended Plaintiffs' claims were necessarily federal in character. Under the Supremacy Clause and federal law, the United States has the right to manage the dam to protect lives and property in emergencies. The United States has the right to take control of the dam during heavy rainfall. The right of federal control cannot be eroded by suits for injunctions and damages against those who acceded, as they must, to federal power over navigable waters and their tributaries.

Historically, the dam was completed and the power pool was filled in 1941. The State bargained for a grant from the United States to pay for initial construction of

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[1] *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940).

the project. The State, ex rel. GRDA, agreed to operate the completed project. The United States, in turn, agreed to and obtained ownership of flowage easements permitting it to flood surrounding lands up to the level the Corps deemed necessary for its flood control program. GRDA acquired land and easements necessary to operate the power pool. This cooperative federal-state program, coupled with dual ownership of the area around the lake, continued virtually unchallenged[2] for over 50 years, until these suits were filed in 1994. The dam creates a reservoir, Grand Lake, which is used for power generation, flood control and recreation. When it is apparent that the lake will rise above 745 feet at the dam, the United States

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[2] GRDA was sued shortly after the dam was completed – before the United States had completed its acquisition of flood storage easements. *GRDA v. Board of Education of Town of Wyandotte*, 193 Okla. 551, 147 P.2d 1003 (1943), *cert. denied*, 322 U.S. 733 (1944). At that time, GRDA's contract with the United States (an agreement that was actually incorporated into the license) dictated that the federal program of flood control would not be fully implemented until the United States finished acquiring the easements it determined it would need. A flood occurred, GRDA cooperated with the United States, and was sued for having done so – under the theory that this cooperation was not required because the United States had not yet purchased the easements. This controversial opinion is the crux of Plaintiffs' lawsuit. Plaintiffs contend that because the United States *still* has not purchased sufficient easements, GRDA is liable under state law – hence, the extraordinary efforts to have this case remanded to Ottawa County, situated in the flood zone – the very court which ruled against GRDA more than 50 years ago in a damage suit. After *Wyandotte*, the United States agreed in writing to indemnify GRDA for flood damage claims – which was the basis, in part, for GRDA's third-party suit against the United States

Army Corps of Engineers controls water releases from the dam. The Corps directs releases until the reservoir falls below 745. Plaintiffs claim the water level is too high and that too much water is retained under the Corps' direction. Plaintiffs agree GRDA must obey the Army's commands, but contend GRDA must also pay for resultant damages. GRDA's removal of the suits was as agent and contractor of the federal government – entitling it to assert an immunity defense and have that defense adjudicated in federal court pursuant to 28 U.S.C. § 1442.

After removal, Plaintiffs successfully sought remand. The United States District Court for the Northern District of Oklahoma, Honorable Sven Holmes, held that GRDA could not invoke the federal officer removal statute because GRDA is owner of the Pensacola Dam, and therefore cannot be a contractor. *Dalrymple v. Grand River Dam Authority*, 932 F.Supp. 1311 (N.D. Okla. 1996). The trial court ruled there were no federal claims because it could not look beyond the allegations of Plaintiffs' Complaint to determine the nature of the claim. The court further held that because the United States was immune and any claim for indemnity or injunction exceeded $10,000, it had no jurisdiction.

GRDA appealed, contending that the adverse ruling rejecting the federal immunity claim and its right to federal officer removal were substantive rulings on the merits, reviewable on appeal. That is, the trial court went beyond a simple adjudication that the trial court had no jurisdiction. The Court of Appeals, Tenth Circuit, consolidated the cases for appeal, and declined to review the remand order containing the substantive rulings. Because

the trial court had stated it remanded for lack of jurisdiction, the Tenth Circuit determined it must accept the language of the remand order at face value. Accordingly, the appeal was dismissed. A petition for rehearing and suggestion for rehearing *en banc* was subsequently denied.

ARGUMENT

> ***"The validity of the defence authorized to be made is a distinct subject. It involves wholly different inquiries. . . . It has no connection whatever with the question of jurisdiction."***
>
> ***The Mayor v. Cooper, 6 Wall. 247 at 254 (1868), as quoted in Mesa v. California, 489 U.S. 121, at 129 (1989).***

This case involves important issues of federal/state comity and the scope of judicial review. At stake is a federal flood control program in northeastern Oklahoma, which is affected by, and directly affects, at least 13 other reservoirs on eight different rivers in three states in the Arkansas River Basin. The Pensacola Project is but one cog in the Corps' flood control and navigation apparatus, and its releases and storage must be coordinated and operated within the context of that entire apparatus. If GRDA is to be held liable for its actions under the orders of the United States, it will be unable to continue its contract with the United States. At issue is whether the federal flood control program will be controlled by federal directives or by the state court in Ottawa County, Oklahoma.

CONFLICT AMONG THE CIRCUITS

There is a conflict within the Court of Appeals as to whether a determination that a defendant has not alleged a colorable immunity defense in a federal officer removal is reviewable on appeal. Compare, *Ohio v. Wright*, 992 F.2d 616 (6th Cir. 1993) and *Angelides v. Baylor College of Medicine*, 117 F.3d 833 (5th Cir. 1997) (such ruling not reviewable) with *Jamison v. Wiley*, 14 F.3d 222 (4th Cir. 1994) and *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996) (decision regarding immunity is reviewable even when contained in a remand order). And see, *Taboas v. Mlynczak*, 149 F.3d 576 (7th Cir. 1998) (permitting review of order denying substitution under the Westfall Act and equating substitution with immunity to find the matter reviewable on appeal.) This court has not ruled on the issue, but has come very close in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). *Lamagno* held that a certification that a federal government employee was acting within the course and scope of his employment was reviewable by appeal. Similarly, in this case, the court should find that the determination of an immunity defense is appealable based upon its settled precedent regardless of whether the order denying immunity is contained in a remand order.

This court has held that the validity of a federal defense is a separate issue from jurisdiction, *The Mayor v. Cooper*, 6 Wall. 247 (1868), and thus, it appears that the determination is reviewable under *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), and *Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). In addition, the determination that GRDA is not entitled to remove an action brought against it for acts done under direction of

the United States conflicts with *Teague v. GRDA*, 279 F.Supp. 703 (N. D. Okla. 1968), *aff'd*, 425 F.2d 130 (10th Cir. 1970).

THE VALIDITY OF A FEDERAL DEFENSE IS SEPARATE AND DISTINCT FROM JURISDICTIONAL ISSUES.

In *The Mayor v. Cooper*, 6 Wall. 247 (1868), this court ruled the **validity** of a federal defense is a separate and distinct inquiry from the issue of whether the federal courts have **removal jurisdiction** over a cause under the federal officer removal statute. The question presented in this case is whether a determination that a federal defense is not valid is appealable. 28 U.S.C. § 1447(d) only prohibits appeals from remand orders based on procedural defects or based on a finding of lack of jurisdiction. Since this court has held that the two issues, validity of the defense and jurisdiction over the case, are separate and distinct, § 1447(d) is no bar to appeal. If a federal defense supports removal jurisdiction, the rejection of the defense does not divest a federal court's jurisdiction over the removed action.

The Fourth Circuit has determined that the rejection of an immunity defense is not insulated from review, even if contained in a remand order. In *Jamison v. Wiley*, 14 F.3d 222 (4th Cir. 1994), the Fourth Circuit held that rejection of an immunity defense under the federal officer removal statute does not affect removal jurisdiction, and that therefore, remand based on such rejection is reviewable on appeal. The rejection of an immunity defense

does not divest the court of subject matter jurisdiction and permits review of the order.

> That the federal court ultimately rejects the federal defense that supported removal under § 1442(a)(1) does not mean that it thereby loses subject matter jurisdiction over the removed action; "the jurisdiction of the federal courts over a properly removed action will not be defeated by later developments in the suit." 14A C. Wright, A. Miller, & E. Cooper, supra, § 3739, at 582.

Jamison, at 239.

Similarly, in *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996), the Fourth Circuit held that inclusion of two dispositions – denial of immunity and remand to state court in a single order – did not deprive the court of jurisdiction to review the **immunity ruling**. The Tenth Circuit's ruling, that it could not review the trial court's ruling on immunity because it was contained in a remand order directly conflicts with the rulings of the Fourth Circuit. The ruling also conflicts with *Cooper*, where this court held that questions of immunity and jurisdiction are separate, as well as with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), where this court held that orders denying immunity are immediately appealable.

THE PURPOSE OF FEDERAL OFFICER REMOVAL

The federal officer removal statute is an incident of federal supremacy, and one of its purposes is to provide a federal forum in cases where federal officials and those

acting under them, may raise defenses arising from their official duties. Thus, the test for removal is broader, not narrower, than the test for official immunity. *Willingham v. Morgan*, 395 U.S. 402 (1969). Because the government can only act through its officers and agents, such right is necessary to protect the ability of the government to act. Thus, the right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act under color of federal office, regardless of whether the suit could have originally been brought in a federal court. The removal statutes should not be read to have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. *Id.*, see also, *Tennessee v. Davis*, 100 U.S. 257, 263 (1880).

The only prerequisite to removal of an action under 28 U.S.C. § 1442 is that it be brought against a federal officer or agency or a person acting under a federal officer. There is no requirement under the statute that the federal court have subject matter jurisdiction over the claim against the federal officer. "To the contrary, § 1442 itself grants independent jurisdictional grounds over cases involving federal officers where a district court otherwise would not have jurisdiction." *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 156 (5th Cir. 1982). Removal was proper under Section 1442(a)(1) as GRDA provided undisputed evidence it was acting under the control of a federal officer during the flooding complained of by Plaintiffs. Thus, it was acting for the federal government, to implement a federal flood control program.

The government has the same interest in getting its work done when it uses others to do its work. *Boyle v.*

United Technologies Corp., 487 U.S. 500 (1988). The civil liability of work done for the government is controlled by federal law. *Id.* "If [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. at 20-21. In this case, GRDA is being sued for actions done at the specific command of the United States. Because the United States is immune for its flood control activities,[3] so is GRDA when acting under the United States orders.

GRDA ALLEGED A COLORABLE FEDERAL DEFENSE

For purposes of removal it is only required that the defendants allege a **colorable** defense under federal law. "The validity of the defence authorized to be made is a distinct subject. It involves wholly different inquiries. . . . It has no connection whatever with the question of jurisdiction." *The Mayor v. Cooper*, 6 Wall. at 254. In this case, as in *Cooper*, plaintiffs complained the defendants were trespassing on their property. Further, as in *Cooper*, the defense was that the complained of acts were done under orders of the United States Army. In *Cooper*, Justice Swayne decided that removal was appropriate. He declared that a colorable defense was raised under federal law since the defendants were on Cooper's land because they were complying with the dictates of the

[3] 33 U.S.C. § 702c.

federal law, as ordered by a military commander. A federal defense to trespass was stated; removal was therefore appropriate. The court should likewise find that removal was appropriate in this case, and that GRDA alleged a valid federal defense . . . that it was acting under orders from the Secretary of War and the Corps of Engineers during the times Plaintiffs seek to hold GRDA liable.

The removal statutes were never intended to give the district courts the final word on whether a Defendant is entitled to immunity. The district court's findings [that GRDA cannot remove under Section 1442(a)(1), and that GRDA does not share the immunity of the United States for acts done on behalf of and at the instance of the United States] are reviewable on appeal. The Tenth Circuit's refusal to review those findings on the merits is wrong.

When a district court decides more than the basic question of removal jurisdiction, its rulings are, and should be, subject to appellate review. Here, the determination that GRDA is not entitled to immunity for acts done as an agent of the federal government, and as a person acting under the District Commander of the United States Army Corps of Engineers, has implications which extend beyond the immediate question of whether there is federal subject matter jurisdiction. Similarly, the trial court's holding, that the Federal Power Act makes GRDA liable to the plaintiffs (that is, that plaintiff's claim arises under federal law) goes to the heart of both the Plaintiffs' claims and GRDA's defenses thereto and mandates removal jurisdiction. These holdings may *not* be insulated from review by framing those factual and legal

conclusions in the context of a ruling on a motion to remand.

DETERMINATIONS OF IMMUNITY ARE APPEALABLE

This Court recognizes the right to appeal from an order in which a federal officer is denied immunity. *See, e.g., Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (appeal from denial of immunity to government official); *Mitchell v. Forsyth,* 472 U.S. 511 (1985) (a district court's denial of qualified immunity is an immediately appealable "final decision" within the meaning of 28 U.S.C. § 1291); *Behrens v. Pelletier,* 516 U.S. 299 (1996) (dismissal of federal officer's immunity claim is immediately appealable as a "final" decision under 28 U.S.C. § 1291 and *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949). GRDA has the same right of appeal from the denial of its immunity claim as any other government officer or agent. *DeVargas v. Mason & Hanger-Silas Mason Co.,* 844 F.2d 714 (10th Cir. 1988), *cert. denied,* 498 U.S. 1074 (1991).

GRDA's entitlement to remove the case under the federal officer removal statute, which is related to the immunity issue, is appealable because the decision falls under Section 1442(a)(1) and not under Section 1447(c). The trial court's order concerning GRDA's right to invoke the federal officer removal statute, and its denial of GRDA's claim of immunity, are final orders, reviewable on the merits on appeal.

GRDA has sustained its burden of proving a colorable defense, by its assertion of immunity. *Williams v. Brooks*, 945 F.2d 1322 (5th Cir. 1991), *cert. denied*, 504 U.S. 931. That assertion entitles GRDA to appeal the denial of immunity. Whether GRDA ultimately prevails on its immunity defense is irrelevant. GRDA has a colorable claim to the defense, and that defense should be judged by federal standards in a United States district court, and appealed the same as any other order denying immunity.[4] GRDA is entitled to appeal the trial court's deprivation of GRDA's immunity claim.

EXCEPTIONS TO BAR OF APPELLATE REVIEW OF REMAND ORDERS

Section 1447(d)'s bar of review has evolved under two United States Supreme Court decisions: *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), and *Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140 (1934).

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[4] *Akin v. Big Three Industries, Inc.*, 851 F.Supp. 819, 823 (E.D. Tex. 1994) (removal may be grounded on a federal contractor defense even if the defendant fails to prevail on the defense); *Pack v. AC and S, Inc.*, 857 F. Supp. 26, 28 (D. Md. 1994) (raising a colorable defense overcomes the well pleaded complaint rule, and undocumented allegations that the defendant cannot prove the defense does not preclude its being raised at trial); *Conjugal Partnership v. Conjugal Partnership*, 22 F.3d 391, 395-96 (1st Cir. 1994) (a plausible federal defense is established by alleging that the dispute arose out of federal regulations governing the relationship between the parties, requiring the Court to construe federal statutes and regulations; and the defendant need not show that he is entitled to prevail in order to have access to the federal forum).

Under *Thermtron* and *Waco, supra*, the prohibition against appellate review is limited to cases where remand is pursuant to 28 U.S.C. § 1447(c) (relating to defect in removal procedure or lack of subject matter jurisdiction). As a result, where the trial court *determines a substantive issue*, even though on a motion for remand, the order is reviewable. Further, under the *Waco* rule, a remand order is appealable where it was precipitated by an order of dismissal.

Section 1447(d) and Section 1447(c) are to be construed *in pari materia*. *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). A remand order is therefore immune from appellate review only if it invokes the grounds specified in Section 1447(c) – that is, that removal was defective or the Court had no jurisdiction. *Kolibash v. Committee on Legal Ethics*, 872 F.2d 871 (4th Cir. 1989).

District court remand orders determining non-jurisdictional questions are subject to appellate review. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the Court stated that the appellate courts have the power "to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of removal." 423 U.S. at 352. *Thermtron* established that remand orders which go beyond an examination of the removal procedure itself, or beyond an examination of the trial court's *removal* jurisdiction, are subject to appellate review.

Thermtron is applied in a variety of contexts similar to those present in the three cases which are the subject of

this appeal. For example, in *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3d Cir. 1995), the Court noted that "a remand only falls under § 1447(c) if the removal itself was jurisdictionally improper, not if the defect arose after removal." *Id.* at 223. In this case, there is no question that the suits were removable on the dates GRDA removed them. Section 1442(a)(1) provides an absolute right of removal, based on the Notice of Removal. When GRDA's right of removal was challenged, GRDA met its burden of proving a colorable claim to its defense. The district court's decision to remand a year and a half later, in the midst of ongoing discovery and pretrial motions, was based on subsequent events: (1) the district court's decision on the merits of GRDA's shared immunity defense, (2) dismissal of the United States as a party, and (3) the unexplained decision to first allow Plaintiffs a right of action against GRDA under the Federal Power Act and then issue a decision not to exercise jurisdiction over such claim because it is not explicitly pleaded in Plaintiffs' complaint. Such orders are appealable under *Thermtron*, even when contained in a remand order.

Jurisdiction over this appeal is supported by *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984).[5] An order of remand based on a forum selection clause was not a decision within the scope of Section 1447(c) and was thus reviewable; it had nothing

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[5] The *Pelleport* decision was adopted by the Tenth Circuit in *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342 (10th Cir. 1992) [holding that a remand based upon a forum selection clause was reviewable because it was outside the scope of Section 1447(c)].

to do with the propriety of the removal but was a substantive decision on the merits. *Id.* at 276. The same is true here. The district court completely eliminated GRDA's affirmative defense of shared immunity, dismissed the United States, and then was in a position to remand the case to state court by first ignoring the statutory basis of Plaintiffs' claims and the fact that it had just resolved substantive issues by reference to federal law. The trial court went far beyond a decision based merely on lack of jurisdiction.

In *Carr v. American Red Cross*, 17 F.3d 671 (3d Cir. 1994), the court ruled that where the underlying order impacted on more than the issue of federal subject matter jurisdiction, appellate review was appropriate.[6] *Carr* was approved by the Tenth Circuit in *Hanna v. Naegele*, 72 F.3d 137 (10th Cir. 1995) (Table) (unpublished opinion, 1995 WL 723597). *Hanna* involved removal of a malpractice suit by a civilian health care provider at an Air Force base. The Tenth Circuit held that an order denying the defendant's petition for certification as an employee of the United States acting within the scope of his employment preceded and was separate from, the remand order – thereby avoiding the Section 1447(d) restriction on appellate review. Moreover, the trial court's order had the

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[6] *See also, Powers v. Southland Corp.*, 4 F.3d 223 (3d Cir. 1993) (orders which have independent relevance with respect to the rights of the parties are separable, independent claims, even though they also have an effect on the court's jurisdiction).

effect of denying the defendant's claim of absolute immunity and as such was an immediately appealable collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

In this case, the remand order went far beyond stating there was no jurisdiction. Rather, it determined that GRDA had no immunity defense. This determination is reviewable on appeal, even if it is contained in an order of remand, just as the immunity issue was reviewable in *Carr* and *Hanna*.

IMPORTANT ISSUES OF PUBLIC POLICY SUPPORT REVIEW

In *Kozera v. Spirito*, 723 F.2d 1003 (1st Cir. 1983), the plaintiffs were challenging the state's implementation of federal directives, and if they prevailed the state would be caught in a "squeeze play" caused by a court order which was irreconcilable with federal, state, and regulatory requirements. Similarly, in *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988), the court noted that the federal government required the defendants to act as they did. "Not to allow immunity here places defendants between Scylla and Charybdis – potentially liable either to plaintiffs for obeying the contract or to governmental bodies for breaching it." *Id.*, at 722. This is precisely the situation here. If Plaintiffs prevail, the state court will enjoin the operation of the dam under federal law, so that GRDA will have to choose between obeying the Ottawa County Court and the federal government. Plaintiffs seek to hold GRDA liable for

following the mandate of federal law and its contracts with the federal government. Failing to comply with federal regulations could make GRDA guilty of a misdemeanor under 16 U.S.C. § 811.[7] Failing to obey a court order could subject GRDA to contempt proceedings. Thus, GRDA is in a "squeeze play" caused by a proposed court order which cannot be reconciled with federal, state and regulatory requirements. This is the very situation for which the court in *DeVargas, supra,* held that such facts gave rise to a claim of shared immunity as well as the right to appellate review of the denial of the defendant's immunity claim. It is also similar to the situation in *Cooper,* where the federal agent was sued under state law for following orders of a federal army officer.

This Court has held that it is the **function** of individual defendants – the nature of the individual responsibilities – not their **status**, that controls in resolving immunity defenses. *Forrester v. White,* 484 U.S. 219 (1988); *Cleavinger v. Saxner,* 474 U.S. 193, 201 (1985). When GRDA releases flood waters from Grand Lake, it is operating under direct orders from the Corps. Its status for purposes of flood control, is as an agent of the United States, as it is acting for the United States. GRDA is thus "serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Richardson v. McKnight,* 521 U.S. 399 (1997).

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[7] Indeed, during the construction of the dam, the federal army was called out to prevent the state from interfering with the dam's completion. *U.S. v. Phillips,* 33 F.Supp. 261 (N.D. Okla. 1940) *vacated on other grounds,* 312 U.S. 246 (1941); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508 (1941).

It is clearly acting for the federal government, and is entitled to immunity.

The courts have not considered the dilemma that GRDA faces. The statutes require GRDA to follow federal directives on flood control. The Plaintiffs, however, seek an injunction and other relief to require GRDA to operate the dam so as to minimize damages to their property. GRDA cannot follow both federal law and Plaintiffs' directives. Either federal law is supreme and protects GRDA from Plaintiffs' suit, or it can be modified by state courts. Either the Pensacola Dam is part of a multi-state federal flood control program, or it is purely a local concern over which the state court has jurisdiction. It cannot be both.

CONCLUSION

> ***[M]eaning in law depends upon an understanding of purpose. Law's words, however technical they may sound, are not magic formulas; they must be read in light of their purposes, if we are to avoid essentially arbitrary applications and harmful results.***
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> ***Behrens v. Pelletier, 516 U.S. 299, 324 (1996) (Breyer, J., dissenting).***

The court should not permit form to prevail over substance. The decision regarding GRDA's entitlement to immunity was a determination on the merits, reviewable on appeal. The inclusion of that decision in a remand order, forever depriving GRDA of an important right, should not insulate the decision from review. Decisions denying a federal actor's right to trial in federal court are

too important to entrust the final decision to a federal district court, shielded from appellate scrutiny.

Respectfully submitted,

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APPENDIX

Jack DALRYMPLE; Rosemary Dalrymple; David A. Adams; R.D. "Buddy" Adams; Kenneth Bales; Patricia Bales; Gerald L. Baser; Bettie L. Baser; Larry J. Becker; Robert K. Berry; Susan M. Berry; Mark E. Blankenship; Board of Commissioners of Ottawa County, Oklahoma; Charles Bowling; Kathy Bowling; Calvin Brady; Chet Brewington and Susan Brewington, d/b/a Thunderbird Motel; Edna Offutt Bryant; George Campbell; Carol Sue Campbell; Kenneth Cass; Maxine Cass; Marvin Champlin; Joyce Champlin; Don Childers; Dee Childers; City of Miami, Oklahoma, a municipal corporation; H. Dale Conard; Sherry Davis; Chester Desilva; Debbie Desilva; E.G. Ventures, Inc.; Maxine Ferguson; Earl B. Ferris; Kenneth Ferris; Diann Ferris; Howard W. Hoover; Stephen L. Hunter; Debbie L. Hunter; Smithy Jameson; K.C. Jeffries; Gary B. Jenkins; Betty A. Jenkins; Steve Kresyman, d/b/a/ Miami Car Wash; Roy K. Lacen; Ida M. Lacen; Jeffrey Lavine; Johnia Lavine; Bruce Lawrence; Regina Lawrence; Faye Lester; Vera Dowty Lowery; Tim Lucas; Rhonda Lucas; Chris Mabury; Debra Mabury; Nadine Macy; Justin Mahurin; Becky Mahurin; Louis E. Mathia, d/b/a Riverside Auto Salvage; Jeffry McCool and Carolyn McCool, d/b/a Vettes and Vans; E.W. McRae; Miami Animal Hospital, Inc.; Miami Tire Service, Inc.; Miami Tribe of Oklahoma; Mid-America Land, Grain & Cattle Company; Leo J. Mills; Virginia D. Mills; Jimmie Mooneyham; Alan E. Newkirk; Mary Niffen; Tammy Niffen; Robert E. Patterson; David D. Payne; Robert Pewitt; Ann Pewitt; Tim Potter, d/b/a Potter Landscaping & Nursery; James Redden; Cathy Redden; Wayne E. Roberts; Claude Rogers; Joseph A. Rosin; Rosin Heritage, Inc.; Paula S. Rutledge; Nick A. Shade; Marian Shipman; Gary Roy Shoultz, d/b/a Gary's Barbecue and Deli; Robert L. Silversmith; Ruth Silversmith; Bess M. Stephens; Edison B. Stepp;

Patricia Stevens; Randy Stoner; George S. Stunkard, d/b/a Blaster's Arcade; Glen Summers; Dean Trone; Teresa Trone; Bert Vanatta; C.H. Vanatta; Donald Vaughn; Loretta J. Vaughn; Emma Vaughn; Everett R. Wagoner; Madeleine Wagoner; Joseph Walden; Harold Watson; Bill E. Way; Shelby Way; Maynard Weathers; Joann Weathers; Lahoma Webb; Michael Webb; Ruth Webb; Wayne L. Webb; Nancy C. Webb; R. Neil Wells; James L. Wetzel; Harmon Wiley; Anna Lee Wiley; John D. Wilhoit, Jr.; Rose M. Wilhoit; David Wilkinson; James Worley; Cheryl Worley; individually and as representatives of a class consisting of all persons and entities located upstream of Pensacola Dam who have been injured by floods caused or increased by the Dam since September 1992, Plaintiffs-Appellees,

v.

GRAND RIVER DAM AUTHORITY, and Ronald Coker, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority, Defendants-Third-Party Plaintiffs-Appellants,

v.

UNITED STATES of America ex rel. FEDERAL ENERGY REGULATORY COMMISSION, and United States Army Corps of Engineers, Third-Party Defendants-Appellees.

Nos. 96-5113 to 96-5115.

United States Court of Appeals, Tenth Circuit.

May 28, 1998.

N. Larry Bork (Wayne T. Stratton, with him on the brief) of Goodell, Stratton, Edmonds & Palmer, L.L.P., Topeka, Kansas; and Frank M. Hagedorn (Graydon D. Luthey, with him on the brief) of Hall, Estill, Hardwick,

Gable, Golden & Nelson, Tulsa, Oklahoma, for Plaintiffs-Appellees.

Janet Kay Jones (Susan Tomasky, General Counsel, and Joseph S. Davies, Acting Solicitor, with her on the brief), Federal Energy Regulatory Commission, Washington, DC, for Third-Party Defendant-Appellee Federal Energy Regulatory Commission.

Philipe Pinnell (Stephen C. Lewis, United States Attorney, with him on the brief), Assistant United States Attorney, Tulsa, Oklahoma, for Third-Party Defendant-Appellee United States Army Corps of Engineers.

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Before BRORBY and McWILLIAMS, Circuit Judges, and BLACK*, District Judge.

BRORBY, Circuit Judge.

Appellant, Grand River Dam Authority (the "Authority"), is a conservation and reclamation district created pursuant to Oklahoma statute "for the purpose of utilizing the waters of Grand River and its tributaries." *Grand River Dam Auth. v. Wyandotte Bd. of Educ.*, 193 Okla. 551, 147 P.2d 1003, 1004 (1943) (citing Okla. Stat. tit. 82, § 861 (1941)), *cert. denied*, 322 U.S. 733, 64 S.Ct. 1045, 88 L.Ed.

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* The Honorable Bruce D. Black, District Judge for the District of New Mexico, sitting by designation.

1568 (1944); *Teague v. Grand River Dam Auth.*, 425 F.2d 130, 132 (10th Cir.1970). Acting as a state agency, the Authority owns and operates the Pensacola Hydroelectric Project/Pensacola Dam, in accordance with the terms and conditions of its Federal Energy Regulatory Commission ("FERC") license and the Federal Power Act, 16 U.S.C. § 799.

In March 1994, the Wagoner and Roberts plaintiffs filed separate suits against the Authority for property damage resulting from flooding along the Spring River in 1993. The Wagoner and Roberts plaintiffs later amended their petitions to include flood damage that occurred in 1994. In September 1994, the Dalrymple plaintiffs brought a class action suit against the Authority for property damage suffered as a result of the increased elevation and duration of flooding on the Neosho River from 1992-94. The Neosho and Spring rivers combine to form the Grand River, which is impounded by the Pensacola Dam. Plaintiffs filed their complaints in Oklahoma state court; collectively, they asserted claims of inverse condemnation, consequential damage to private property for public use, breach of contract, strict liability, trespass, and nuisance. The Dalrymple plaintiffs also sought injunctive relief as an alternative to their damage claims.

The Authority removed the actions to federal district court alleging proper jurisdiction under 28 U.S.C. §§ 1441(b) and 1442(a)(1). In response to each action, the Authority also filed third party complaints against FERC and the United States Army Corps of Engineers (the "Corps"), seeking indemnification for any damages ultimately awarded to the Plaintiffs.

Upon Plaintiffs' motions, and after some discussion at a status hearing, the district court remanded the cases to state court by orders dated April 2, 1996. The district court dismissed the Authority's third party claims against the federal agencies by separate orders on the same date.[1] The Authority appeals both rulings in each Plaintiff's action. The appeals have been consolidated for purposes of briefing and disposition.

Because we conclude the remand orders were based to a fair degree upon the district court's finding it lacked subject matter jurisdiction to hear the cases, we are statutorily precluded from reviewing those orders, on appeal or otherwise. 28 U.S.C. § 1447(d). We therefore grant Plaintiffs' motions to dismiss the Authority's appeal of the remand orders.

Our jurisdiction to review the district court's orders dismissing the Authority's third party complaints against FERC and the Corps is not likewise restricted.[2]

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[1] The district court entered substantially the same orders in each docketed case. Because the evidence and argument supporting remand and dismissal were virtually identical in each suit, we will address the remand orders collectively and the dismissal orders collectively.

[2] It is clear from the record that while they were filed on the same date, the dismissal orders were drafted prior to and separate from the remand decisions. The remand orders mentioned the dismissals, yet in no way were predicated on the dismissals. The Authority filed its notices of removal prior to filing its third party complaints and thus never relied on its claims against the federal agencies as grounds for removal. The Supreme Court has held even if a dismissal leads to a remand, it is still permissible to review the dismissal order. *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143, 55 S.Ct. 6, 79 L.Ed.

Reviewing those orders *de novo, SK Finance SA v. La Plata County,* 126 F.3d 1272, 1275 (10th Cir.1997), we affirm.

DISCUSSION

Remand of Plaintiffs' Cases to State Court

Relying on 28 U.S.C. § 1447(d),[3] Plaintiffs seek to dismiss this portion of the appeal, claiming we have no jurisdiction to review the remand orders. The threshold issue, therefore, is one of appellate jurisdiction.[4]

In determining whether § 1447(d) deprives us of jurisdiction to review the district court's remand orders, we first acknowledge the application of § 1447(d) is not as broad as its language suggests. Appellate review is barred by § 1447(d) only when the district court remands

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244 (1934) (district court cannot prevent appellate review of a final collateral order by contemporaneously remanding a case to state court). Thus, we perceive no barrier to our review of the dismissal orders in this case.

[3] 28 U.S.C. § 1447(d) states:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 [civil rights] of this title shall be reviewable by appeal or otherwise.

[4] The Authority raises several substantive challenges to the remand orders. Because we hold we are without jurisdiction to review those orders, we do not address those challenges.

on grounds permitted by § 1447(c).[5] *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995); *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976). An explicit reference to § 1447(c) does not automatically render a remand order nonreviewable, however. *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir.1997). Nor does the absence of such a reference automatically confer appellate jurisdiction over a remand order. In order to evaluate the reviewability of the district court's remand orders, we must independently review the record to determine the actual grounds upon which the district court believed it was empowered to remand. *Id.*

One of the grounds for remanding a case under § 1447(c) – the ground at issue here – is a determination the federal district court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). We have held if a "remand order was based to a fair degree upon the court's finding that it lacked subject matter jurisdiction to hear the case," such order is rendered nonreviewable under § 1447(d). *Flores v. Long*, 110 F.3d 730, 733 (10th Cir.1997); *see also Archuleta*, 131 F.3d at 1363. This remains true even if the district court's jurisdictional determination appears erroneous, so

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[5] 28 U.S.C. § 1447(c) reads:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

long as that determination was made in good faith. *Archuleta*, 131 F.3d at 1362-63; *Flores*, 110 F.3d at 732-33.

The Authority removed Plaintiffs' cases to federal court alleging proper federal jurisdiction under 28 U.S.C. §§ 1441(b) and 1442(a)(1). Section 1441(b) provides in relevant part:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

To support removal under § 1441(b), the Authority argued Plaintiffs' claims amount to federal constitutional claims because the Pensacola Dam is on navigable waters and is subject to federal government control pursuant to the Commerce Clause.

Section 1442 provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of

> criminals or the collection of the revenue.[6]

The Authority claimed it was entitled to removal under this provision because it effectively acted as a government contractor or federal agent, which at all times operated the Pensacola Dam and reservoir according to the terms and conditions of its FERC license and, during flood stage, pursuant to the Corps' directives.[7]

In remanding these cases, the district court concluded there was no basis for removal under either § 1441(b) or § 1442(a)(1). According to the district court, removal under § 1441(b) was not warranted because Plaintiffs' various causes of action do not implicate any federal right or immunity – there simply is no federal controversy apparent on the face of the Plaintiffs' complaints. With respect to § 1442(a)(1), the court held the Authority failed to aver a colorable federal immunity defense, as is

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[6] This provision was amended after the Authority removed Plaintiffs' cases to federal court. The amendment, which legislatively reversed the Supreme Court's decision in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991), H.R.Rep. No. 104-798 (1996), 1996 WL 532692 at 56-57, by extending removal jurisdiction to actions against federal agencies as well as those against federal officers, has no effect on our disposition in this case.

[7] According to the Authority, FERC establishes target levels for the reservoir throughout the year. When reservoir elevation is projected to reach flood state – 745 feet or more – the Authority operates the dam as directed by the Corps. The Corps directs flood control operations because the Neosho River, as part of the Arkansas River basin, is included in the federal flood control program designed to protect residents of Missouri, Kansas, Arkansas and Oklahoma.

necessary to support removal by an officer or agency of the United States, or any person acting under such officer or agency. The court did not explicitly refer to § 1447(c) in its remand orders; however, Plaintiffs specifically requested relief pursuant to § 1447(c) in their motions to remand.

Having independently reviewed the record, we are convinced the district court based its remand decision upon the belief it lacked subject matter jurisdiction to hear Plaintiffs' claims. The remand orders at issue clearly do not reflect the typical nonjurisdictional determination involving a discretionary remand of supplementary or pendent claims, venue, abstention, comity, or the waiver of opportunity to challenge a procedurally irregular removal. Instead, the orders address key issues directly related to whether the district court could have exercised subject matter jurisdiction over the cases – the presence of a federal question on the face of the plaintiffs' complaints, and/or the presence of a federal question in the form of a colorable federal immunity defense.

On its face, § 1441(b) requires a district court to determine whether it has "original jurisdiction" over the case at bar. Thus, an inquiry into the propriety of removal under § 1441(b) necessarily incorporates an inquiry into subject matter jurisdiction. An inquiry into the propriety of removal under § 1442(a)(1) similarly encompasses a subject matter jurisdiction determination since removal under that section is predicated not just on the federal character of the defendant, but also on the averment of a defense grounded in federal law. *See Mesa v. California*, 489 U.S. 121, 136, 139, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989). Accordingly, we cannot see how the district court's

remand orders could be characterized as based on anything but a lack of subject matter jurisdiction as contemplated by § 1447(c).[8] We therefore are precluded by § 1447(d) from reviewing those orders. Plaintiffs' motions to dismiss the Authority's appeal of the remand orders are granted.

Dismissal of Third Party Complaints

The Authority filed third party complaints against both FERC and the Corps, seeking indemnification from the United States for any liability the Authority may have

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[8] We acknowledge the Fifth Circuit's efforts to characterize district court remand decisions as procedurally based so as to apply waiver principles and thereby avoid nonreviewability. *See Hopkins v. Dolphin Titan Int'l, Inc.*, 976 F.2d 924 (5th Cir.1992); *In re Digicon Marine, Inc.*, 966 F.2d 158 (5th Cir.1992); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir.), *cert. denied*, 502 U.S. 963, 112 S.Ct. 430, 116 L.Ed.2d 449 (1991). We fear such maneuvering unnecessarily convolutes the law in this area and runs afoul of strong congressional policy against review of remand orders "in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Thermtron Prod., Inc.*, 423 U.S. at 351, 96 S.Ct. 584.

As stated above, we believe a remand decision based on improper removal under §§ 1441(b) and 1442(a)(1) is appropriately characterized as a decision based on a lack of subject matter jurisdiction, not a procedural defect. But *see Archuleta*, 131 F.3d at 1365 (Baldock, J. dissenting). Nevertheless, to the extent §§ 1441(b) and 1442(a)(1) could be considered procedural limitations, a remand order issued pursuant to a timely motion asserting a defect in the removal procedure also is precluded from appellate review. *Petrarca*, 516 U.S. at 127-28, 116 S.Ct. 494. The Authority does not contest the fact Plaintiffs' filed their motions for remand within the thirty days allotted by § 1447(c).

to the Plaintiffs. Each agency responded with a motion to dismiss on multiple grounds: (1) under both the Federal Tort Claims Act, 28 U.S.C. § 2680(a), and the jurisdictional limits of 28 U.S.C. § 1346, the court lacked subject matter jurisdiction, (2) sovereign immunity barred the Authority's third party claims, and (3) the Authority failed to state a cause of action upon which relief could be granted.

The district court granted the motions for lack of subject matter jurisdiction. The court first concluded, and the Authority conceded, the federal agencies were immune from any liability to the Authority deriving from Plaintiffs' tort claims. To the extent the United States could be liable to indemnify the Authority for damages related to the Plaintiffs' inverse condemnation claims,[9] the district court concluded that because each Plaintiff claimed damages in excess of $10,000, the amount in controversy exceeded the $10,000 limit within which it can exercise jurisdiction pursuant to 28 U.S.C. § 1346(a)(2). Thus, according to the district court, the

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[9] We note the district court characterized Plaintiffs' inverse condemnation claims as Fifth Amendment claims. (Apt.App. Vol. II at A915.) Plaintiffs clarify they filed their inverse condemnation claims under Article II, Section 24 of the Oklahoma Constitution and Okla. Stat. tit. 27, § 12, not the federal Constitution. (No. 96-5113, Reply to GRDA's Memorandum in Opposition to Motion of Plaintiffs to Dismiss Action Pursuant to 10th Cir. R. 27.2.1 at 3; Apt.App. Vol. I at A29-69 ¶¶ 35-48; Vol. II at A1001-07 ¶¶ 26-29; Vol. III at A1194-98 ¶¶ 20-22.) This discrepancy in no way affects the district court's determination that jurisdiction over the Authority's third party claims resides solely within the United States Court of Federal Claims.

United States Court of Federal Claims has exclusive subject matter jurisdiction over the Authority's third party indemnification actions. 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1).

The Authority asserts the district court erred in finding Plaintiffs' inverse condemnation claims exceeded the $10,000 jurisdictional limit. The Authority further argues dismissal was improper since (1) indemnity is a cause of action available against the United States, (2) the federal government bears the ultimate responsibility for purchasing the lands necessary for operation of the dam during flooding, and (3) the Authority's liability is predicated solely on activities it undertook as an agent of the federal government. While these arguments may bear superficial appeal, we agree with the district court they overlook fundamental jurisdictional infirmities.

Like the district court, we begin from the premise that FERC and the Corps, as United States defendants, are immune from suit, absent an expressed waiver of sovereign immunity. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980); *see also U.S. v. Richman (In re Talbot)*, 124 F.3d 1201, 1206 (10th Cir.1997) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)). As the district court indicated, the Authority conceded there is no waiver of immunity from liability related to Plaintiffs' tort claims. The Authority therefore based its indemnification claim against the federal government solely on liability exposure related to Plaintiffs' inverse condemnation claims. In so doing, however, the Authority failed to identify any applicable statutory waiver of sovereign

immunity from liability deriving from inverse condemnation claims, or to otherwise explain why the United States' waiver of sovereign immunity for actions based on the United States Constitution or express or implied contract, *see* 28 U.S.C. § 1346(a)(2), necessarily pertains to its indemnification claims.

As legal grounds to avoid sovereign immunity, the Authority seems to rely merely on its assertion indemnity is a cause of action available against the United States, its self-described role as the United States' agent when operating the Pensacola Dam, and the fact Congress appropriated monies in 1996 to purchase additional land from property owners impacted by flooding in the vicinity of the Pensacola Dam. We are not convinced such grounds are adequate. Nevertheless, because we agree with the district court the amount in controversy is the dispositive jurisdictional issue, we will assume, without deciding, the Authority's indemnification claims based on liability exposure related to Plaintiffs' inverse condemnation claims fall within the scope of 28 U.S.C. § 1346(a)(2).

It is beyond dispute § 1346(a)(2) limits federal district court jurisdiction to claims against the federal government not exceeding $10,000; the Court of Federal Claims has exclusive jurisdiction over such claims in excess of $10,000. 28 U.S.C. §§ 1346 and 1491. The Authority asserts the district court erred in its jurisdictional ruling since the court had no basis upon which to determine the amount of damages attributable to Plaintiffs' inverse condemnation claims, apart from their other claims. The Authority also suggests the district court could retain jurisdiction over the third party claims since Plaintiffs sought injunctive relief. Even if the Court of Federal Claims does have

exclusive jurisdiction, the Authority argues its claims should have been transferred pursuant to 28 U.S.C. § 1631, not dismissed.

The issue before us is whether the district court has jurisdiction over the Authority's third party complaints, not Plaintiffs' complaints. Thus, it is of no significance that some Plaintiffs requested injunctive relief. The amount of Plaintiffs' damage claims is significant, however, because those claims are the reason for the Authority's third party indemnity actions against FERC and the Corps. The record confirms each plaintiff sought damages in excess of $10,000. The record further illustrates there is no need to allocate Plaintiffs' damage claims to each different theory of recovery, since Plaintiffs prayed for full recovery in excess of $10,000 on any one of their alternative claims. Even more telling, the Authority did not attempt to quantify its liability exposure vis-a-vis Plaintiffs' inverse condemnation claims. Rather, it sought indemnification from the United States for any and all amounts the Plaintiffs recover from the Authority. The amount in controversy as reflected by each third party complaint thus exceeds $10,000. Assuming the Authority can overcome the sovereign immunity barrier and other potential obstacles,[10] jurisdiction over its indemnity claims against the United States government lies exclusively within the Court of Federal Claims.

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[10] As FERC points out, the Authority's indemnity claims are inextricably linked to Plaintiffs' state law claims. The Court of Federal Claims arguably has no jurisdiction over Plaintiffs' complaints, and thus could decline to adjudicate the Authority's indemnity claims on grounds they were premature.

Finally, while the district court could have transferred the Authority's third party complaints to the Court of Federal Claims pursuant to 28 U.S.C. § 1631, we perceive no error in its failure to do so. Section 1631 requires an action to be transferred "to any other such court in which the action or appeal could have been brought at the time it was filed" if the transfer "is in the interest of justice." 28 U.S.C. § 1631. The Authority provides no explanation why justice would have been served by such a transfer. Moreover, it appears the Authority could refile its third party actions in the Court of Federal Claims without penalty, should it choose to do so.

CONCLUSION

For the foregoing reasons, we DISMISS the Authority's appeal of the district court's remand orders for lack of appellate jurisdiction. We AFFIRM the district court's dismissal of the Authority's third party complaints against FERC and the Corps.

Jack **DALRYMPLE** and Rosemary Dalrymple,
et al., Plaintiffs,

v.

GRAND RIVER DAM AUTHORITY,
Defendant/Third Party Plaintiff,

v.

UNITED STATES of America ex rel., FEDERAL ENERGY REGULATORY COMMISSION; and United States Army Corps of Engineers,
Third Party Defendants.

No. 94-C-970-H.

United States District Court,
N.D. Oklahoma.

April 2, 1996.

Scott R. Rowland, Frederic N. Schneider, III, L.K. Smith, Boone Smith Davis Hurst & Dickman, Tulsa, OK, Wayne T. Stratton, N. Larry Bork, Sam Brownback, Goodell Stratton Edmons & Palmer, Topeka, KS, for plaintiffs.

Tony M. Graham, United States Attorney, Tulsa, OK, Jody R. Nathan, Robert A. Franden, Feldman Hall Franden Woodward & Farris, Tulsa, OK, Allen B. Pease, Grand River Dam Authority, Vinita, OK, for defendant/third party plaintiff.

Donna Smith, David E. Jones, Logan & Lowry, Vinita, OK, for intervenors.

Janet Jones, Federal Energy Regulatory Commission, Washington, DC, for third-party defendant U.S. ex rel. Federal Energy Regulatory Com'n.

Phil Pinnell, United States Attorney, Tulsa, OK, Kay Hoover, John Roselle, Terence Smith, United States Army Corps of Engineers, Tulsa District, Tulsa, OK, for third-party defendant U.S. Army Corps of Engineers.

ORDER

HOLMES, District Judge.

This matter comes before the Court on Plaintiffs' Motion to Remand (Docket # 4).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of inverse condemnation, consequential damage to private property for public use, strict liability, trespass, nuisance, and injunction against Defendant Grand River Dam Authority ("GRDA"). Plaintiffs contend that they sustained damage to their property as a result of the release of water from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla.Stat.Ann. § 861, which operates the Pensacola Dam pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC").

GRDA removed this action to the United States District Court for the Northern District of Oklahoma on October 14, 1994, alleging that jurisdiction is proper under 28 U.S.C. §§ 1441(b) and 1442(a)(1). On October 21, 1994, GRDA filed a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). In an Order entered on this date, the Court dismissed the Third-Party Complaint against the

United States. The Court now considers Plaintiffs' motion to remand.

I.

GRDA claims that removal is proper under Section 1442(a)(1) because it was acting pursuant to the direction of a federal officer when it released the waters that allegedly flooded Plaintiffs' property. Section 1442 provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color or such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(emphasis added). GRDA alleges that it is entitled to remove the action under Section 1442(a)(1) because it operates the dam pursuant to a license from FERC and because the Corps directs releases from Grand Lake when the water level is within the flood pool.

Removal under Section 1442(a)(1) must be predicated upon the averment of a colorable federal defense to Plaintiffs' claims. *Mesa v. California*, 489 U.S. 121, 139, 109 S.Ct. 959, 970, 103 L.Ed.2d 99 (1989). Although a defendant

need not prove that it would prevail on its federal immunity defense in order to obtain removal, *see Willingham v. Morgan*, 395 U.S. 402, 407, 89 S.Ct. 1813, 1816, 23 L.Ed.2d 396 (1969), a defendant must "allege facts that would support a colorable immunity defense if those facts were true," *State v. Ivory*, 906 F.2d 999, 1002 (4th Cir.1990).

GRDA contends that it has satisfied this requirement by asserting a claim of "shared immunity" with the federal government. Specifically, GRDA relies upon the "government contractor's immunity" recognized by the Supreme Court in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1939). The Supreme Court has recognized government contractor's immunity in a products liability action against a manufacturer who manufactured allegedly defective products under a contract with the federal government and in accordance with government specifications. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). Government contractor's immunity has also barred claims against a construction company performing labor for the government pursuant to a government contract. *Yearsley*, 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554. GRDA has offered no evidence that it is either producing goods or performing labor pursuant to a government contract. Rather, GRDA owns and operates its own facility. The mere fact that it is licensed by FERC does not transform it into a government contractor for purposes of securing federal immunity. In fact, to the contrary, the statutory terms incorporated into the license itself specifically render GRDA, as licensee, liable for damages incurred by third parties as a result of the licensee's operation of its project. Section 10(c) of the Federal Power Act provides:

All licenses issued under this subchapter shall be on the following conditions:

> (c) Maintenance and repair of project works; liability of licensee for damages
>
> That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

16 U.S.C. § 803(c) (emphasis added); *see Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369, 50 S.Ct. 140, 74 L.Ed. 483 (1930) (relying upon Section 803(c) to hold licensee liable to third parties).

GRDA recognizes the applicability of this language, *see* Def.'s Mem. in Opp'n to Pls. Mot. to Remand at 17 n. 16, but seeks to avoid it. GRDA states in brief as follows:

> Section 10(c) of the Federal Power Act was enacted in 1920. Section 3 of the Flood Control Act of 1928 (33 U.S.C. § 702(c)) – the basis for GRDA's claim of shared immunity – was

> enacted later. Section 10(c) generally addresses the liability for all federal hydroelectric licensees. Section 3 of the Flood Control Act of 1928 addresses the specific issue of liability for the federal government's flood control activities. As both a later enactment, and a more specific enactment, the provisions of Section 3 of the Flood Control Act of 1928 prevail over the more general provision of Section 10(c) of the Federal Power Act.

Id. GRDA's reliance upon Section 702c, however, is misplaced. That provision merely states that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. It does not extend that protection to licensees, nor does it even allude to the licensee's role in the flood control process. In fact, one federal appellate court has rejected the notion that Section 702c provides "shared immunity" to local water districts operating flood control projects constructed by the Corps. *Taylor Bay Protective Ass'n v. Administrator, United States Envtl. Protection Agency,* 884 F.2d 1073 (8th Cir.1989). By contrast, Section 10(c) of the Federal Power Act deals exclusively with the relationship between licensees and the federal government, squarely placing potential liability on licensees and explicitly preserving the federal government's immunity. The Court therefore rejects GRDA's claim that it shares in the general immunity of the United States when federal law specifically subjects licensees to liability to third parties.[1] Because

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[1] The Court also rejects GRDA's argument that it is entitled to government contractor's immunity because it is acting

GRDA does not have a colorable federal immunity defense to this action, the Court does not have jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).

II.

GRDA asserts 28 U.S.C. § 1441(b) as an additional basis for removal. That provision states:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

In applying Section 1441(b), the Tenth Circuit has held that

> the required federal right or immunity must be an essential element of the plaintiff's cause of action, and [ ] the federal controversy must be 'disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.'

Fajen v. Foundation Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir.1982) (citations omitted). It is uncontested that

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pursuant to federal law and "contracts with the Corps of Engineers." Def.'s Supp.Resp. at 8. Nothing contained in the statutes and regulations cited in support of this proposition transforms them from regulatory provisions issued by a governmental entity into contracts between two consenting parties.

the alleged federal right or immunity is not an element of Plaintiffs' cause of action. Instead, GRDA contends that the "fundamental issues in this case involve federal flood control activities, whether or not Plaintiffs have chosen so to plead those issues." Def.'s Mem. at 22. In support of the proposition that federal law, though unspoken, can so permeate a petition that it mandates removal, GRDA cites *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). In *Taylor*, the Supreme Court held that the defense of ERISA preemption need not appear on the face of the complaint because ERISA claims are necessarily federal in character. *Id.* at 66, 107 S.Ct. at 1547-48. The Court has held herein that GRDA has no claim to federal immunity. Furthermore, the Court rejects GRDA's assertion that Plaintiffs' claims are necessarily federal in character. Therefore, there is no basis for removal under Section 1441(b).

Accordingly, Plaintiffs' Motion for Remand is hereby granted (Docket # 4). The Clerk of the Court is directed to send a copy of this Order to the Clerk of the District Court of Ottawa County, Oklahoma.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK DALRYMPLE and ROSEMARY DALRYMPLE, et al.,	)	
Plaintiffs,	)	
v.	)	Case No.
GRAND RIVER DAM AUTHORITY,	)	94-C-970-H
Defendant/Third Party Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA ex rel FEDERAL ENERGY REGULATORY COMMISSION; and UNITED STATES ARMY CORPS OF ENGINEERS,	)	
Third Party Defendants.	)	

ORDER

(Filed Apr. 2, 1996)

This matter comes before the Court on a Motion to Dismiss filed by each of the Third Party Defendants, the Federal Energy Regulatory Commission (Docket #18) and the United States Army Corps of Engineers (Docket #20).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of inverse condemnation, consequential damage to private property for public use, strict liability, trespass, nuisance, and injunction against Defendant Grand River Dam Authority ("GRDA"). Plaintiffs contend that they sustained damage to their property

as a result of the release of water from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla. Stat. Ann. § 861, which operates the Pensacola Dam pursuant to a license issued by the Federal Energy Regulatory Commissions ("FERC").

GRDA removed this action to the United States District Court for the Northern District of Oklahoma on October 14, 1994, alleging that jurisdiction is proper under 28 U.S.C. §§ 1441(b) and 1442(a)(1). On October 21, 1994, GRDA filed a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). FERC and the Corps now challenge this Court's jurisdiction.

Sovereign immunity bars suits against the United States absent an express waiver of immunity. *United States v. Mitchell,* 445 U.S. 535 (1980). If the sovereign does consent to be sued, it may define the jurisdiction of the court entertaining that suit. *Id.* at 538. Section 1346 of Title 28 of the United States Code provides:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of. . . .
>
> > (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . .

> (b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Thus, in those cases in which the United States has waived its immunity as to tort claims, this Court has jurisdiction. Plaintiffs allege various tort claims against GRDA, who, in turn, seeks indemnity from the United States. However, GRDA explicitly acknowledges that the United States possesses immunity from these tort claims. Def.'s Br. in Opp'n to the Third Party Defs.' Mot. to Dismiss Third-Party Compl. at 5. The Court therefore does not have jurisdiction over the portion of the Third-Party Complaint arising out of the tort claims.

Plaintiffs also assert two claims for inverse condemnation. Inverse condemnation is essentially a claim for just compensation for the taking of property as required by the Fifth Amendment to the United States Constitution. Plaintiffs seek "just compensation" for each Plaintiff "in excess of $50,000" from GRDA, who seeks full indemnification from the United States. This constitutes a claim in excess of $10,000 that is founded upon the United States Constitution, thus divesting this Court of its jurisdiction.

Section 1491(a)(1) of Title 28 of the United States Code provides in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Court of Federal Claims therefore has concurrent jurisdiction over all civil actions against the United States arising under the Constitution for claims "not exceeding $10,000," *see* 28 U.S.C. § 1346(a)(2), and exclusive jurisdiction over those actions, such as this, that seek damages in excess of $10,000.

Accordingly, the Court hereby dismisses GRDA's claims against FERC and the Corps for lack of subject matter jurisdiction (Dockets #18, 20).

IT IS SO ORDERED.

This 2nd day of April, 1996.

/s/ Sven Erik Holmes
Sven Erik Holmes
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVERETT R. WAGONER and MADELINE WAGONER,

Plaintiffs,

v.

GRAND RIVER DAM AUTHORITY and RONALD COKER, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority,

Defendants/Third Party Plaintiffs,

v.

UNITED STATES OF AMERICA ex rel FEDERAL ENERGY REGULATORY COMMISSION; and UNITED STATES ARMY CORPS OF ENGINEERS,

Third Party Defendants

Case No. 94-C-1091-H

(Filed Apr. 2, 1996)

WAYNE E. ROBERTS,

Plaintiff,

v.

GRAND RIVER DAM AUTHORITY and RONALD COKER, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority,

Defendants/Third Party Plaintiffs,

Case No. 94-C-1092-H

v.)
)
UNITED STATES OF AMERICA ex)
rel FEDERAL ENERGY)
REGULATORY COMMISSION; and)
UNITED STATES ARMY CORPS OF)
ENGINEERS,)
)
Third Party)
Defendants.)

ORDER

This matter comes before the Court on Plaintiffs' Motion to Remand (Docket #9).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of trespass and inverse condemnation against Defendants Grand River Dam Authority ("GRDA") and Ronald Coker. Plaintiffs contend that they sustained damage to their property as a result of the release of water from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla. Stat. Ann. § 861, which operates the Pensacola Dam pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC"). Mr. Coker is the General Manager and Chief Executive Officer of GRDA.

Defendants removed this action to the United States District Court for the Northern District of Oklahoma on April 12, 1994. Concluding that Defendants had not offered any evidence to establish that they were acting under the control of a federal officer, the United States District Court remanded the case to the District Court of Ottawa County. Plaintiffs then filed an amended petition

Defendants filed an answer, asserting a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). Defendants then removed the action to the United States District Court again, alleging that jurisdiction is proper under 28 U. S.C. §§ 144 1(b) and 1442(a)(1). In an Order entered on this date, the Court dismissed the Third-Party Complaint against the United States. The Court now considers Plaintiffs' motion to remand.

Defendants claim that removal is proper under Section 1442(a)(1) because GRDA was acting pursuant to the direction of a federal officer when it released the waters that allegedly flooded Plaintiffs' property. Section 1442 provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States or any agency thereof, *or person acting under him,* for any act under color or such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(emphasis added). Defendants allege they are entitled to remove the action under Section 1442(a)(1) because GRDA operates the dam pursuant to a license from FERC and because the Corps directs releases from Grand Lake when the water level is within the flood pool.

Removal under Section 1442(a)(1) must be predicated upon the averment of a colorable federal defense to Plaintiffs' claims. *Mesa v. California*, 489 U.S. 121, 139 (1989). Although a defendant need not prove that it would prevail on its federal immunity defense in order to obtain removal, *see Willingham v. Morgan*, 395 U.S. 402, 407 (1969), a defendant must "allege facts that would support a colorable immunity defense if those facts were true," *State v. Ivory*, 906 F.2d 999, 1002 (4th Cir. 1990).

Defendants contend that it has satisfied this requirement by asserting a claim of "shared immunity" with the federal government. Specifically, Defendants rely upon the "government contractor's immunity" recognized by the Supreme Court in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1939). The Supreme Court has recognized government contractor's immunity in a products liability action against a manufacturer who manufactured allegedly defective products under a contract with the federal government and in accordance with government specifications. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Government contractor's immunity has also barred claims against a construction company performing labor for the government pursuant to a government contract. *Yearsley*, 309 U.S. 18. Defendants have offered no evidence that GRDA is either producing goods or performing labor pursuant to a government contract. Rather, GRDA owns and operates its own facility. The mere fact that it is licensed by FERC does not transform it into a government contractor for purposes of securing federal immunity. In fact, to the contrary, the statutory terms incorporated into the license itself specifically render GRDA, as licensee, liable for damages incurred by third

parties as a result of the licensee's operation of its project. Section 10(c) of the Federal Power Act provides:

> All licenses issued under this subchapter shall be on the following conditions:
>
> (c) Maintenance and repair of project works; liability of licensee for damages
>
> That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property. *Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.*

16 U.S.C. § 803(c) (emphasis added); *see Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369 (1930) (relying upon Section 803(c) to hold licensee liable to third parties).

Defendants recognize the applicability of this language, *see* Defs.' Mem. in Opp'n to Pls.' Mot. to Remand at 19 n.12, but seek to avoid it. Defendants state in brief as follows:

> Section 10(c) of the Federal Power Act was enacted in 1920. Section 3 of the Flood Control

> Act of 1928 (33 U.S.C. § 702(c)) – the basis for GRDA's claim of shared immunity – was enacted later. Section 10(c) generally addresses the liability for all federal hydroelectric licensees. Section 3 of the Flood Control Act of 1928 addresses the specific issue of liability for the federal government's flood control activities. As both a later enactment, and a more specific enactment, the provisions of Section 3 of the Flood Control Act of 1928 prevail over the more general provision of Section 10(c) of the Federal Power Act.

Id. Defendants' reliance upon Section 702(c), however, is misplaced. That provision merely states that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702(c). It does not extend that protection to licensees, nor does it even allude to the licensee's role in the flood control process. In fact, one federal appellate court has rejected the notion that Section 702(c) provides "shared immunity" to local water districts operating flood control projects constructed by the Corps. *Taylor Bay Protective Ass'n v. Administrator, United States Envtl. Protection Agency*, 884 F.2d 1073 (8th Cir. 1989). By contrast, Section 10(c) of the Federal Power Act deals exclusively with the relationship between licensees and the federal government, squarely placing potential liability on licensees and explicitly preserving the federal government's immunity. The Court therefore rejects Defendants' claim that they share in the general

immunity of the United States when federal law specifically subjects licensees to liability to third parties.[1] Because Defendants do not have a colorable federal immunity defense to this action, the Court does not have jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).

II.

Defendants assert 28 U.S.C. § 1441(b) as an additional basis for removal. That provision states:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought. In applying Section 1441(b), the Tenth Circuit has held that the required federal right or immunity must be an essential element of the plaintiff's cause of action, and [] the federal controversy must be 'disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.'

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[1] The Court also rejects Defendants' argument that it is a government contractor because "GRDA's operation of the dam is pursuant to federal contracts entered into under federal statutes and regulations." Defs.' Supp. Resp. at 8. Nothing contained in the statutes and regulations cited in support of this proposition transforms them from regulatory provisions issued by a governmental entity into contracts between two consenting parties.

Fajen v. Foundation Reserve Ins. Co,, 683 F.2d 331, 333 (10th Cir. 1982) (citations omitted). It is uncontested that the alleged federal right or immunity is not an element of Plaintiffs' cause of action. Instead, Defendants contend that the "fundamental issues in this case involve federal flood control activities, whether or not Plaintiff has chosen so to plead those issues." Defs.' Mem. at 23. In support of the proposition that federal law, though unspoken, can so permeate a petition that it mandates removal, Defendants cite *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987). In *Taylor,* the Supreme Court held that the defense of ERISA preemption need not appear on the face of the complaint because ERISA claims are necessarily federal in character. *Id.* at 66. The Court has held herein that Defendants have no claim to federal immunity. Furthermore, the Court rejects Defendants' assertion that Plaintiffs' claims are necessarily federal in character. Therefore, there is no basis for removal under Section 1441(b).

Accordingly, Plaintiffs' Motions for Remand are hereby granted (Docket #9). The Clerk of the Court is directed to send a copy of this Order to the Clerk of the District Court of Ottawa County, Oklahoma.

IT IS SO ORDERED.

This 2nd day of April, 1996.

/s/ Sven Erik Holmes
Sven Erik Holmes
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE E. ROBERTS, Plaintiff, v. GRAND RIVER DAM AUTHORITY and RONALD COKER, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority, Defendants/Third Party Plaintiffs, v. UNITED STATES OF AMERICA ex rel FEDERAL ENERGY REGULATORY COMMISSION; and UNITED STATES ARMY CORPS OF ENGINEERS,	)	Case No. 94-C-1092-H

ORDER
(Filed Apr. 2, 1996)

This matter comes before the Court on a Motion to Dismiss filed by each of the Third Party Defendants, the Federal Energy Regulatory Commission (Docket #19) and the United States Army Corps of Engineers (Docket #14).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of trespass and inverse condemnation against Defendants Grand River Dam Authority ("GRDA") and Ronald Coker. Plaintiffs contend that they sustained damage to their property as a

result of the release of water from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla. Stat. Ann. § 861, which operates the Pensacola Dam pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC"). Mr. Coker is the General Manager and Chief Executive Officer of GRDA.

Defendants removed this action to the United States District Court for the Northern District of Oklahoma on April 12, 1994. Concluding that Defendants had not offered any evidence to establish that they were acting under the control of a federal officer, the United States District Court remanded the case to the District Court of Ottawa County. Plaintiffs then filed an amended petition. Defendants filed an answer, asserting a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). Defendants then removed the action to the United States District Court again. FERC and the Corps now challenge this Court's jurisdiction.

Sovereign immunity bars suits against the United States absent an express waiver of immunity. *United States v. Mitchell*, 445 U.S. 535 (1980). If the sovereign does consent to be sued, it may define the jurisdiction of the court entertaining that suit. *Id.* at 538. Section 1346 of Title 28 of the United States Code provides:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . .
>
> > (2) Any other civil action or claim against the United States, not exceeding $10,000 in

> amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . .
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Thus, in those cases in which the United States has waived its immunity as to tort claims, this Court has jurisdiction. Plaintiffs allege a claim of trespass against Defendants/Third Party Plaintiffs, who, in turn, seek indemnity from the United States. However, Defendants/Third Party Plaintiffs explicitly acknowledge that the United States possesses immunity from this tort claim. Defs.' Br. in Opp'n to the Third Party Defs.' Mot. to Dismiss Third-Party Compl. at 1, 6. The Court therefore does not have jurisdiction over the portion of the Third-Party Complaint arising out of the tort claim.

Plaintiffs also assert a claim for inverse condemnation. Inverse condemnation is essentially a claim for just compensation for the taking of property as required by

the Fifth Amendment to the United States Constitution. Plaintiffs seek "in excess of $10,000" from Defendants/ Third Party Plaintiffs, who seek full indemnification from the United States, This constitutes a claim in excess of $10,000 that is founded upon the United States Constitution, thus divesting this Court of its jurisdiction.

Section 1491(a)(1) of Title 28 of the United States Code provides in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Court of Federal Claims therefore has concurrent jurisdiction over all civil actions against the United States arising under the Constitution for claims "not exceeding $10,000," *see* 28 U.S.C. § 1346(a)(2), and exclusive jurisdiction over those actions, such as this, that seek damages in excess of $10,000.

Accordingly, the Court hereby dismisses the Defendants'/Third Party Plaintiffs' claims against FERC and the Corps for lack of subject matter jurisdiction (Dockets #19,14).

IT IS SO ORDERED.

This 2nd day of April, 1996.

/s/ Sven Erik Holmes
Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE E. ROBERTS, Plaintiff, v. GRAND RIVER DAM AUTHORITY and RONALD COKER, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority, Defendants/Third Party Plaintiffs, v. UNITED STATES OF AMERICA ex rel FEDERAL ENERGY REGULATORY COMMISSION; and UNITED STATES ARMY CORPS OF ENGINEERS, Third Party Defendants.	)	Case No. 94-C-1092-H

ORDER
(Filed Apr. 11, 1996)

This matter comes before the Court on Defendants' Motion to Reconsider and for Immediate Stay of Remand (Docket #64).

Under Rule 60(b) of the Federal Rules of Civil Procedure,[1] the Court has discretion to grant the "extraordinary procedure" of relief from a final judgment or order. *Greenwood Explorations, Ltd. v. Merit Gas & Oil Corp.*, 837 F.2d 423, 426 (10th Cir. 1988); *Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983). Based on its review of Defendants' motion, the Court declines to grant this relief. Defendants' motion to Reconsider and Stay of Remand (Docket #64) is accordingly denied.

IT IS SO ORDERED.

This 11th day of April, 1996.

/s/ Sven Erik Holmes
Sven Erik Holmes
United States District Judge

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[1] Defendants also request relief pursuant to Fed. R. Civ. P. 59(e), which provides: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." No judgment was entered herein, therefore Rule 59(e) is inapplicable to the instant case.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE E. ROBERTS, Plaintiff, v. GRAND RIVER DAM AUTHORITY and RONALD COKER, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority, Defendants/Third Party Plaintiffs, v. UNITED STATES OF AMERICA ex rel FEDERAL ENERGY REGULATORY COMMISSION; and UNITED STATES ARMY CORPS OF ENGINEERS, Third Party Defendants.	)	Case No. 94-C-1092-H

ORDER
(Filed Apr. 12, 1996)

This matter comes before the Court on Defendants' Motion for Interlocutory Certification and for Stay of Remand Pending Interlocutory Appeal (Docket #65).

Defendants seek certification of the issues underlying the Court's remand order entered April 2, 1996. Defendants assert that certification is available pursuant to 28 U.S.C. § 1292(b), which provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and than an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . .

The Court concludes that certification is not appropriate in the instant case. Defendants' Motion for Interlocutory Certification and for Stay of Remand Pending Interlocutory Appeal is hereby denied (Docket #65).

IT IS SO ORDERED.

This 12th day of April, 1996.

/s/ Sven Erik Holmes
Sven Erik Holmes
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JACK DALRYMPLE, et al.,	)	
Plaintiffs-Appellees,	)	
v.	)	
GRAND RIVER DAM AUTHORITY,	)	
Defendant/Third Party Plaintiff-Appellant,	)	Nos.
v.	)	96-5113
UNITED STATES OF AMERICA, ex rel. FEDERAL ENERGY REGULATORY COMMISSION and UNITED STATES ARMY CORPS OF ENGINEERS,	)	96-5114 96-5115
Third-Party-Defendants-Appellees.	)	

ORDER

(Filed July 28, 1998)

Before **BRORBY** and **McWILLIAMS**, Circuit Judges and **BLACK*** District Court Judge.

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* The Honorable Bruce D. Black, District Court Judge for the District of New Mexico, sitting by designation.

Appellant Grand River Dam Authority's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Ardell Schuler
Deputy Clerk

U.S. CONST. Art.VI cl.2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it

clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original

complaint in the proceeding before the International Trade Commission under section 337 of that Act.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

16 U.S.C. § 811. Operation of navigation facilities; rules and regulations; penalties

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 825o of this title.

33 U.S.C. § 702c. Expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights

Except when authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of sections 702a and 702g of this title shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 702d of this title; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, That if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h, 702i, 702j, 702k, 702l, 702m, and 704 of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of

the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK DALRYMPLE and ROSEMARY DALRYMPLE, husband and wife; DAVID A. ADAMS; R.D. "BUDDY" ADAMS; GERALD L. BASER and BETTIE L. BASER, husband and wife; LARRY J. BECKER; ROBERT K. BERRY and SUSAN M. BERRY, husband and wife; CHARLES BOWLING and KATHY BOWLING, husband and wife; CALVIN BRADY; EDNA OFFUTT BRYANT; GEORGE CAMPBELL and CAROL SUE CAMPBELL, husband and wife; DON CHILDERS and DEE CHILDERS, husband and wife; H. DALE CONARD; E.G. VENTURES, INC.; EARL B. FERRIS; KENNETH FERRIS and DIANN FERRIS, husband and wife; HOWARD W. HOOVER; MIAMI ANIMAL HOSPITAL, INC.; STEPHEN L. HUNTER and DEBBIE L. HUNTER, husband and wife; SMITHY JAMESON; K.C. JEFFRIES; GARY B. JENKINS and BETTY A. JENKINS, husband and wife; MIAMI TRIBE OF OKLAHOMA; STEVE KRESYMAN, d/b/a Miami Car Wash; ROY K. LACEN and IDA M. LACEN,	94 C 970 K Northern District Court No. ___ Ottawa County Court No. CJ-94-444 Proposed CLASS ACTION (Filed Oct. 14, 1994)

husband and wife; JEFFREY)
LAVINE and JOHNIA LAVINE,)
husband and wife; BRUCE)
LAWRENCE and REGINA)
LAWRENCE, husband and wife;)
TIM LUCAS and RHONDA)
LUCAS, husband and wife;)
JUSTIN MAHURIN and BECKY)
MAHURIN, husband and wife;)
BOARD OF COUNTY)
COMMISSIONERS OF OTTAWA)
COUNTY, OKLAHOMA; VERA)
DOWTY LOWERY; CHRIS)
MABURY and DEBRA MABURY,)
husband and wife; LOUIS E.)
MATHIA, d/b/a Riverside Auto)
Salvage; CITY OF MIAMI,)
OKLAHOMA, a municipal)
corporation; LEO JAY MILLS;)
VIRGINIA DIAN MILLS; JEFFRY)
McCOOL and CAROLYN)
McCOOL, husband and wife,)
and d/b/a Vettes and Vans;)
E.W. McRAE; MIAMI TIRE)
SERVICE, INC.; ALAN E.)
NEWKIRK; MARY NIFFEN;)
TAMMY NIFFEN; ROBERT E.)
PATTERSON; MID-AMERICA)
LAND, GRAIN & CATTLE)
COMPANY; DAVID D. PAYNE;)
ROBERT PEWITT and ANN)
PEWITT, husband and wife; TIM)
POTTER, d/b/a Potter)
Landscaping & Nursery; JAMES)
REDDEN and CATHY REDDEN,)
husband and wife; JOSEPH A.)

ROSIN; ROSIN HERITAGE, INC.; PAULA S. RUTLEDGE; NICK A. SHADE; MARIAN SHIPMAN; GARY ROY SHOULTZ, d/b/a Gary's Barbeque and Deli; ROBERT L. SILVERSMITH; RUTH SILVERSMITH; BESS M. STEPHENS; EDISON B. STEPP and PATRICIA STEPP, husband and wife; RANDY STONER; GEORGE S. STUNKARD, d/b/a Blaster's Arcade; GLEN SUMMERS; GEORGE TROLINGER; DEAN TRONE and TERESA TRONE, husband and wife; BERT VANATTA; C.H. VANATTA; EMMA VAUGHN; HAROLD WATSON; BILL E. WAY and SHELBY J. WAY, husband and wife; MAYNARD WEATHERS and JOANN WEATHERS, husband and wife; WAYNE L. WEBB and NANCY CHARLENE WEBB, husband and wife; R. NEIL WELLS; JAMES L. WETZEL; HARMON WILEY and ANNA LEE WILEY, husband and wife; and JOHN D. WILHOIT, JR. and ROSE M. WILHOIT, husband and wife; JAMES WORLEY and CHERYL WORLEY, husband and wife; individually, and as representatives of a class consisting of all persons and

entities located upstream of Pensacola Dam who have been injured by floods caused or increased by the Dam since September, 1992,	)
Plaintiffs,	)
v.	)
GRAND RIVER DAM AUTHORITY,	)
Defendant.	)

NOTICE OF REMOVAL

Your Petitioner, Grand River Dam Authority, (GRDA), states that it is entitled to have said suit removed from the District Court of Ottawa County, State of Oklahoma, into the District Court of the United States for the Northern District of Oklahoma and respectfully show as follows:

1. This action is a suit of a civil nature at law of which the District Court of the United States has original jurisdiction and has been brought and is now pending in the District Court of Ottawa County, State of Oklahoma.

2. This Petition for removal is filed within thirty (30) days after service of the Amended Complaint upon said Defendant.

3. Plaintiffs contend that this Defendant has caused their property to be flooded, and that the impoundment of flood waters on Plaintiffs' property has so substantially interfered with the Plaintiffs' use and enjoyment of their property as to constitute a taking thereof. Plaintiffs

seek to be reimbursed for damages resulting from the flooding of their property. Plaintiffs have also claimed the flooding "has damaged such property for public use," and GRDA should be strictly liable for their damages, and have included claims for trespass, nuisance, and injunction. Plaintiffs further seek to be certified as a class.

4. Petitioner asserts that release of flood waters was done only upon orders from an officer of the United States (the Secretary of the Army) acting under color of his office and therefore Defendant performs the same as an agent of and acting under such officer of the United States. Other acts of GRDA complained of by Plaintiffs were done by GRDA in compliance with its License granted by the Federal Energy Regulatory Commission ("FERC") to operate and maintain the 86.9 megawatt Pensacola Project. Thus, GRDA performs the same as a person or agent of and acting under color of authority of such regulatory commission of the United States, as well as under such officer of the United States.

5. The Pensacola Dam and Reservoir was authorized under the Flood Control Act of 1941. Public Laws 77-228. See also Exhibit "A". Section 7 of the Flood Control Act of 1944[1] directs the Secretary of the Army to

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[1] 33 U.S.C. § 709

Regulations for use of storage waters; application to Tennessee Valley Authority

> On and after December 22, 1944, it shall be the duty of the Secretary of the Army to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such

prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with federal funds. Pursuant to GRDA's operating license,[2] it is required to operate the reservoir surface at certain levels. In 1992, GRDA and the Army Corps of Engineers, ("Corps"), acting on behalf of the Secretary of the Army, signed a "letter of understanding" and "water control agreement," which specify their respective responsibilities regarding operation of the Pensacola Reservoir for Flood Control. Those agreements are attached hereto as Exhibits "B" and "C". Under these agreements[3], the Corps, acting on behalf of the Secretary

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purposes, and the operation of any such project shall be in accordance with such regulations: Provided, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the Department of the Army.

[2] GRDA was issued a new hydropower license from the Federal Energy Regulatory Commission ("FERC") on April 24, 1992. 59 FERC ¶ 62,073. In issuing the license, FERC approved a reservoir management rule curve that provided for fluctuating reservoir water levels throughout the year to achieve potential improvements to fish and wildlife resources.

[3] The Corps Pensacola Water Control Manual discusses the objectives of the Pensacola Reservoir as follows:

> 7.01. **General Objectives**. The primary objectives of Pensacola Reservoir are flood control and hydroelectric power production. The flood control operations of Pensacola Reservoir are directed by the Secretary of the Army through the U.S. Army Corps of Engineers, and operated by the Grand River Dam

of the Army, controls water releases from the dam when the storage allocation lies between elevation of 745 feet and 755 feet, and controls all water releases from the floodgates. The operation of the floodgates is always at the direction and control of the Corps. The only water ever released by GRDA from the conservation pool is for the purpose of electrical generation. The Corps directs GRDA in flood control aspects of the operation of the project below elevations of 745 feet during rising pool conditions and during flood recovery operations in the Arkansas River Basin. Therefore, during periods of rising pool conditions, flood recovery and when elevations are greater than 745 feet, the Corps controls the release of water from the dam. From the periods of June 3, 1992 to September 18, 1992; November 11, 1992, through September 4, 1993; September 14, 1993 through October 22, 1993; and November 15, 1993 through November 18, 1993, and on the other dates complained of (April 11, 1994 and April 29, 1994) the Corps controlled the operation of the project. See, e.g., Exhibits "D" and "E".

The Federal Energy Regulatory Commission order of June 10, 1994, states:

> any attributions to issues such as flooding or backwater conditions within the flood pool can

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> Authority (G.R.D.A.). For flood control, the normal procedure assumes operation of Pensacola, Markham Ferry and Ft. Gibson reservoirs as a system of reservoirs, utilizing similar percentages of the flood control storage in each project. This system of reservoirs is operated in conjunction with the remaining reservoirs in the Arkansas River basin to provide maximum benefits. . . .

not be reached and are, in any event, under the purview of the U.S. Army Corps of Engineers.

67 FERC ¶ 62,239 at page 64,431, attached hereto as Exhibit "A". The FERC order also notes the license requirements to meet certain target reservoir surface levels. These target levels are between 741 feet and 745 feet.

6. Further authority for removal by this Defendant may be found in *Teague v. Grand River Dam Authority*, 279 F.Supp. 703 (N.D. Okl. 1968), affirmed on appeal at 425 F.2d 130 (10th Cir. Okl. 1970).

7. Under these circumstances, Petitioner is entitled to remove the case to Federal Court pursuant to 28 U.S.C. § 1442(a)(1).

8. Furthermore, this action arises under the United States Constitution, since the Pensacola project is on navigable waters, and is subject to control by the federal government pursuant to the Commerce Clause, and pursuant to 33 U.S.C. § 709, thus, removal is proper under 28 U.S.C. § 1441.

9. Petitioner attaches hereto a copy of the Petition filed in the District Court of Ottawa County, State of Oklahoma, being cause number CJ-94-444, styled *Dalrymple et al., v. Grand River Dam Authority*, and a copy of the summons, served upon the Defendant, as Exhibits "F" and "G" which constitute all the pleadings and process had upon the Defendant to date.

WHEREFORE, Petitioner prays this Court to remove this cause from the District Court of Ottawa County, State

of Oklahoma, into the District Court of the United States for the Northern District of Oklahoma.

Respectfully submitted,

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS

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